IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1356

REINALDO FLECHA, et al.,

Petitioners,

v.

F. RAY MARSHALL and LEONEL CASTILLO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutory and Regulatory Provisions:

Articles, Periodicals, and Reports:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, REINALDO FLECHA, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on December 28, 1977.

OPINIONS BELOW

The order of the United States District Court, Toledo, J., granting preliminary injunctive relief and entered on the 15th day of August, 1977, is attached hereto as Appendix A.

The opinion and order of the United States Court of Appeals for the First Circuit per Aldrich, J., entered on December 28, 1977, is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1977. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION OF LAW PRESENTED

1. Whether the United States Secretary of Labor and the United States Commissioner of the Immigration and Naturalization Service have violated the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.*, by construing that Act and the regulations promulgated thereunder so as to deem unavailable for employment all United States workers who seek wages and working conditions higher than those minima contained in the foreign worker regulations at 20 C.F.R. §§602.10-.10b?

2. Whether the above construction interferes with the right of United States workers to bargain with their employers over wages and working conditions, as guaranteed by the United States Constitution and federal and state law.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions involved in this case are set forth in Appendix C.

1. 8 U.S.C. §1101(a)(15)(H)(ii).
2. 8 U.S.C. §1184(c).
3. 29 U.S.C. §§49 *et seq.*
4. 8 C.F.R. §214.2(h)(3).
5. 20 C.F.R. §§602.10-602.10b.

STATEMENT OF THE CASE

Recruitment for apple pickers by East Coast apple growers occurs from April to July each year. During that same period in 1977, 6,750,000 U.S. workers were unemployed.[1] One hundred forty thousand of these unemployed workers were agricultural workers.[2] In Puerto Rico, alone, there were 2,000 to 4,000 unemployed farmworkers.[3] Yet, in 1977, apple growers obtained 4,000 to 5,000 temporary foreign workers[4] to pick their apples. These foreign workers were used instead of an equivalent number of U.S. workers because U.S. workers had sought to negotiate a wage-benefit package which was $.05 per hour higher than the apple growers were willing to offer.[5] The use of 5,000 foreign workers to pick apples deprived

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1. Bureau of Labor Statistics (U.S. Department of Labor), "Employment and Earnings," Vol. 24 No. 5 (May 1977), p.5. This total represents 7% of the work force.

2. Bureau of Labor Statistics, *Op cit.*, p.44, indicated an unemployment rate of 12.3% among hired agricultural workers. (Hired agricultural workers do not include farm operators and unpaid family members.) There were 1,157,300 hired agricultural workers in the April-July, 1977, period.

3. "U.S. Ordered to Admit 5,000 Foreign Workers," WASHINGTON POST, September 1, 1977, p.A1.

4. See Section A of the Petition for a description of the temporary foreign worker program.

5. The contract consisted of a wage rate plus the following three fringe benefits: (1) three hot meals per day, (2) the procurement of a performance bond by the employer, and (3) a non-occupational group health insurance policy. The record of this case clearly reflects that the three fringe benefits would cost each employer no more than a total of $.05 per hour per worker. Hereinafter, petitioners will refer to this $.05 per hour as either a "wage demand" or a "wage-benefit package."

5,000 U.S. workers of a total wage of $5 million.[6] Moreover, much, if not most, of the money earned by the Jamaicans who picked apples was sent to, and spent in, Jamaica.[7] The nearly bankrupt Social Security Fund received no contribution from these workers or their employers.[8]

The use of temporary foreign workers by East Coast apple growers, rather than being restricted to a "crisis" situation in 1976 and 1977, was the product of the Secretary of Labor's ("Secretary") decision that U.S. workers who sought wages and benefits in excess of the regulations at 20 C.F.R. §§602.10-602.10b ("the Secretary's regulations") were unavailable. The Commissioner of the Immigration and Naturalization Service (INS) followed the Secretary's decision.

The First Circuit decision upheld the policy of the Secretary and the INS:

> The basic fact which the U.S. Secretary faced was the simple one that no Puerto Rican worker would come unless the employer agreed to meet conditions exceeding the U.S. conditions. We may agree with plaintiffs that the reason why is purely secondary; the question is the same whether the Puerto Rican workers' insistence upon P.R. conditions was made for them by the legislature or by the P.R. Secretary, or was

6. An apple picker can earn approximately $1,000 during the picking season.

7. At a minimum, 3% of the Jamaican worker's earnings are withhheld by the Jamaican government. Another 20% is held back as "compulsory savings," payable to the workers upon their return to Jamaica. See, Rifkin and Howard, "Who Should Play God?" *The Progressive* (Dec. 1977), p.39.

8. Under Social Security law, both worker and employer pay a percentage share into the social security fund. 26 U.S.C. §§3102, 3111. Temporary foreign workers and their employers are exempted from the withholding requirement. 26 U.S.C. §3121(6)(1).

> due to insistence by a union to which they all belonged, or was merely the result of Puerto Rican workers not finding the U.S. conditions sufficiently attractive, and demanding more on an individual basis. *Our decision covers all of these matters, and the statute only incidentally.* (Emphasis added.)[9]

This decision permits *all* agricultural employers to substitute temporary foreign workers for U.S. workers at wage rates and conditions lower than those sought by U.S. workers. Agricultural employers thus may refuse to negotiate with U.S. workers because they (the growers) are required by the Secretary, as a precondition to obtaining foreign labor, to offer U.S. workers only the terms and conditions which the Secretary prescribes by regulation.[10] Because the Carter Administration is planning a drastic expansion of the temporary foreign worker program to compensate for proposed sanctions on employers who employ illegal aliens, it is necessary to obtain this Court's review in order to clarify the standards applicable to the temporary foreign worker program. Otherwise, the number of U.S. workers who will lose jobs to cheaper foreign labor will increase into the hundreds of thousands.[11]

Petitioners, U.S. farmworkers from Puerto Rico, in 1976 and 1977, were willing, able and qualified to work as apple pickers in the East Coast apple harvest. However, in 1976, because they requested $.05 more per hour in wages and benefits than the Secretary's regulations required, all of these workers were declared "unavailable" for apple

9. See Appendix B.

10. See discussion, *infra*, part A of this petition.

11. "Alien Farm Help . . . US Plans Big Boost," THE SACRAMENTO BEE, August 31, 1977, p.1.

harvest work.

Petitioners filed the complaint in this case on October 29, 1976.[12] By the summer of 1977, it became apparent that U.S. workers were once again going to be put in the same predicament as occurred in 1976. Therefore, petitioners filed a motion for preliminary injunction in the district court on June 17, 1977. The preliminary injunction which was granted by the district court on August 15, 1977, stated that Puerto Rican workers were available to work in the apple harvest.[13] Thereafter, on August 22, 1977, the government filed a notice of appeal and a motion for a stay pending appeal with the First Circuit. A stay of the preliminary injunction was granted by the First Circuit on August 26, 1977. Oral argument was held on an expedited basis on October 4, 1977.

The First Circuit rendered its decision on December 28, 1977.[14] The decision upheld the Secretary by denying to all U.S. farmworkers the right to negotiate the terms and conditions of their employment. The court made it clear that the decision applied to all U.S. workers—whether from Texas, Florida, California, or Puerto Rico. The decision also applied to situations where the demand for better wages and working conditions arose out of union bargaining, individual negotiation, or state law. However, the decision (1) interferes with federal labor policy which promotes worker organization and negotiation, (2) conflicts with constitutional provisions protecting the right to

12. Federal jurisdiction was alleged *inter alia* under the commerce clause, 28 U.S.C. §1337 and under 28 U.S.C. §1343 for denial of rights guaranteed by the laws of the United States.

13. See Appendix A.

14. See Appendix B.

contract, and (3) conflicts with state laws designed to protect the collective bargaining rights of U.S. farmworkers.[15] Because of the need to protect the right of all United States workers to negotiate the terms and conditions of their employment without these negotiations being undermined by the availability of inexpensive foreign labor, this petition was filed.

REASONS FOR GRANTING THE WRIT

REVIEW BY THE COURT IS NECESSARY TO PREVENT AGRICULTURAL EMPLOYERS FROM USING FOREIGN WORKERS TO UNDERCUT THE WAGES AND WORKING CONDITIONS OF U.S. WORKERS, TO ALLOW U.S. WORKERS THE FREEDOM TO NEGOTIATE WAGES AND WORKING CONDITIONS, AND TO RECTIFY THE IMPROPER ADMINISTRATION OF THE IMMIGRATION LAW SO AS TO EFFECTUATE ITS PURPOSE TO PROTECT U.S. WORKERS.

A. Introduction: The Statutory and Regulatory Scheme

The Immigration and Nationality Act (INA), 8 U.S.C. §1101 *et seq.*, permits the admission of aliens to perform temporary agricultural labor if domestic workers cannot be found. The INA defines as a "non-immigrant" an alien who ". . . is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable

15. Because of the Supremacy Clause, this third issue has constitutional implications.

of performing such service or labor *cannot be found* in this country . . ." 8 U.S.C. §1101(a)(15)(H)(ii)[16] (emphasis added). A non-immigrant thus defined may be admitted upon a determination by the Attorney General after "consultation with appropriate agencies of the government" that the pertinent requirements are satisfied. 8 U.S.C. §1184(c). This determination has been delegated by the Attorney General to the INS and to the Secretary. The INS regulations require that an employer's petition for the admission of non-immigrant aliens to perform temporary service be accompanied by ". . . a certification from the Secretary of Labor . . . stating that qualified persons in the United States are not available and that the employment of the beneficiary [the foreign worker] will not adversely affect the wages and working conditions of workers in the United States similarly situated, or a notice that certification cannot be made . . ." 8 C.F.R. §214.2(h)(2).

The Secretary therefore, has been delegated the duty to determine whether (1) shortages of labor exist at given periods of time for given types of employment, and (2) even when those shortages do exist, whether the employment of foreign workers will adversely affect the wages and working conditions of U.S. workers. The Secretary is the logical choice to make a determination as to whether a labor shortage exists because of his supervision of the United States Employment Service (USES) within the Department of Labor. The USES coordinates the national system of state employment agencies, created by the Wagner-

16. It should be noted that the First Circuit incorrectly cited 8 U.S.C. §1182(a)(14) as the controlling statutory authority. See Appendix B, p. . This section governs the admission of laborers to the country as permanent residents, not as temporary non-immigrants.

Peyser Act, 29 U.S.C. §§49 *et seq.*, to help recruit U.S. workers and to match them with job openings.

In connection with the USES, the Secretary has established the foreign worker certification regulations at 20 C.F.R. §§602.10-10b. (Hereinafter, "the Secretary's regulations.") The intent of these regulations is to prescribe the minimum wages and working conditions[17] which must be offered to U.S. workers and to foreign workers.[18]

Puerto Rico is, and has been since 1952, an integral part of the employment service system. *See*, 29 U.S.C. §49b(b) and 8 U.S.C. §1101(a)(36). In 1975, 1976, and 1977, Puerto Rican workers sought to negotiate contracts which provided a wage rate equal to the Secretary's established minimum rate plus $.05 per hour in fringe benefits.[19] The Secretary declared all Puerto Rican workers unavailable merely because the workers had asked for $.05 per hour more than required by the Secretary's regulations. It was the Secretary's position that the growers could voluntarily choose to pay the $.05 but that, because the regulations did not contain this requirement, the Secretary could not force

17. 20 C.F.R. §602.10(d)(2) reads as follows:

> That reasonable efforts have been and will continue to be made by the Employment Service and the employers to obtain domestic workers at rates and conditions of employment *no less favorable* than those set forth in the regulations in this part . . . (emphasis added).

The First Circuit in Elton Orchards v. Brennan, 508 F.2d 493, 495 (1st Cir. 1974) stated that the Secretary's regulations prescribed minimum conditions.

18. The adverse effect wage rate and the other minimum conditions in the regulations clearly are designed "to prevent [an] adverse effect upon U.S. workers." 20 C.F.R. §602.10b. This aspect, however, is only one-half of the Secretary's duties referred to on p. 8 of this petition. The first duty is to determine whether a labor shortage exists.

19. See n.5, *supra.*

the growers to pay by denying foreign worker certification. By bargaining for better wages and working conditions, U.S. workers were declared unavailable for the apple jobs in question.[20] This decision conflicts with the purpose of 8 U.S.C. §1101(a)(15)(H)(ii) of the INA. The legislative history of that section makes it clear that "certain alien workers," among them agricultural workers, may be admitted temporarily ". . . for the purpose of *alleviating labor shortages* . . ." (emphasis added) H.R. Rep. No. 1365, 82d Cong., 2d Sess., p. 51, 1952 U.S. Code Cong. & Ad. News 1653, 1697-1698. In contrast thereto, the Secretary's policy created a labor shortage which actually did not exist.[21] There was no shortage of U.S. workers prepared to pick apples; rather, the shortage was created by the Secretary's declaration that U.S. workers—whether from Texas, Florida, California or Puerto Rico and whether in a union or not—who do not accept work on the terms contained in the regulations cannot be considered available to work. This interpretation of regulations which were intended to serve as minimum guidelines results in the denial of jobs to thousands of U.S. workers and is in direct

20. The mechanism for determining the availability of U.S. workers where temporary foreign workers are sought stands in contrast to the mechanism employed by the Secretary to determine the availability of U.S. workers where *permanent* foreign workers are sought. *See*, 20 C.F.R. §§656.21 and 656.24. Under these latter regulations, the Secretary determines the availability of U.S. workers based on a consideration of several factors, not solely on whether the U.S. worker will work at a predetermined wage rate. There is no reason that this mechanism cannot be adapted to the temporary regulations, using the "adverse effect rate" as a minimum guideline.

21. Petitioners do not challenge the regulations *per se* but, rather, the application by which the Secretary has, in effect, made the regulations maximum conditions, not minimum.

conflict with the purpose of the INA to protect U.S. workers in their jobs and to give them preference in hiring over foreign workers.

B. Review by the Court is Necessary to Avoid Interference with the Right of Workers to Bargain and Contract

The First Circuit decision has a national impact on labor relations. First, it is inconsistent with federal labor policy established by Congress, principally, through the Norris-LaGuardia Act, 29 U.S.C. §§101 *et seq.*, and the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*; second, the decision is contrary to state laws which guarantee collective bargaining rights to agricultural workers.

1. Federal Labor Policy

It has always been deemed "a fundamental right of employees to organize and to bargain with their employers." *National Maritime Union of America v. Herzog*, 78 F. Supp. 146 (D.D.C. 1948, three-judge court) *aff'd mem.* 334 U.S. 854 (1948). This fundamental right was also established in the Norris-LaGuardia Act in which the public policy in labor matters was stated as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organiza-

> tion, and designation of representatives of his own choosing, *to negotiate the terms and conditions of his employment*, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . (emphasis added) 29 U.S.C. §101.

The Norris-LaGuardia Act prohibited U.S. courts from interfering with labor disputes (as defined in the Act) by way of issuance of restraining orders or temporary or permanent injunctions. 29 U.S.C. §§107-109.

Subsequently, the National Labor Relations Act (NLRA) added additional privileges and benefits—for example, the privilege of a union to become the exclusive bargaining agent of all employees of a particular bargaining unit and the requirement that employers bargain collectively with the chosen representative.

Certain activities between employer and employee were left unregulated by the NLRA, and this Court has held that Congress meant to leave these activities to the control of "the free play of economic forces."[22] *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976) (hereinafter *"Lodge 76"*). Thus, where Congress has not regulated or addressed a specific activity under the NLRA neither a state nor a federal agency may regulate that activity where such

22. This general rule is qualified to the extent that Congress and states may pass laws which guarantee minimum wages and working conditions. See, e.g., the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.*

regulation would "control the results of negotiations." *Lodge 76* at 143.[23]

Since the NLRA does not regulate bargaining[24] between agricultural employee and employer, 29 U.S.C. §152(3), Congress no doubt meant to leave this activity to the "free play of economic forces." *Lodge 76* at 140. Thus, although the Secretary of Labor has the power to promulgate minimum wages and working conditions for agricultural workers, he does not have the authority to "control the results of negotiations" between agricultural employee and employer. *Id.* at 143.

The Secretary violated federal labor policy by dictating the terms and conditions of employment of U.S. farmworkers. According to the Secretary's interpretation and the First Circuit's decision, once the employer offers the terms and conditions contained in the Secretary's regulations, the employer is free to refuse to negotiate, and may, instead, employ foreign labor. Under this system there is no free play of economic forces. The First Circuit decision denies to the farmworker the very tools—organizing, striking, collective bargaining—which Congress intentionally did not deny him and to which he has a fundamental right.[25] Because of this denial, the Court should review this case.

23. Citing S. Rep. No. 105, 80th Cong., 1st Sess., p.2.

24. "Bargaining" is not meant to be a term of art; rather, it is meant to encompass any and all formal and informal processes by which employers and workers arrive at contract terms.

25. The regulations, by placing a limit on negotiation, act very much like the restraints which the Congress, through the Norris-LaGuardia Act, prohibited the courts from imposing.

2. State Collective Bargaining Laws.

State regulation of bargaining between farmworker and employer is acceptable to a limited extent. *See*, Section B(1), *ante.* Accordingly, several states have collective bargaining laws[26] which expressly declare the right of farmworkers to organize and require the employer to recognize and bargain with the appropriate bargaining agent. If the First Circuit's decision prevails, otherwise valid state collective bargaining laws will conflict with the INA, raising the constitutional question of the preemption of these state laws under the Supremacy Clause.

Because of the First Circuit decision, the agricultural employer will never have to bargain under state law. Instead, before a contract is negotiated, a job offer will be placed into the interstate clearance system stating that the terms and conditions of employment will be those listed in the Secretary's regulations. Any union will have to accept the grower's terms or be replaced by foreign workers who will work for wages and working conditions below those requested by the union.

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26. These states are Arizona, the Agricultural Employment Relations Act, Ariz. Rev. Stat. §23-1381 *et seq*; California, Agricultural Labor Relations Act, California Labor Code §1140 *et seq*; Hawaii, Hawaii Rev. Laws §377-1(13); Idaho, Agricultural Labor Act, Idaho Code 22-4101, *et seq*; Kansas, Agricultural Relations Act, Kan. Stat. §44-818 *et seq*; Wisconsin, Wis. Stat. Anno. §111.03; Puerto Rico, Constitution of Puerto Rico, Article II, §17 and 29 L.P.R.A. §§41 *et seq*. On March 13, 1978, the Puerto Rico Supreme Court dismissed as improvidently granted a Writ of Revision in Shade Tobacco Growers Association v. Puerto Rico Labor Relations Board, No. 0-76-132. This dismissal leaves standing a decision of the Puerto Rico Labor Relations Board which upheld the jurisdiction of the Labor Relations Board over collective bargaining between Puerto Rico's agricultural workers and U.S. growers who recruit workers in Puerto Rico.

C. The Secretary's Regulations, as Interpreted, Interfere with Farmworkers' Rights to Contract as Protected by the Fifth and Fourteenth Amendments to the Constitution.

In *Lochner v. New York*, 198 U.S. 45 (1905), this Court struck down a New York statute which established that bakers could not be required or permitted to work more than 10 hours a day. The Court stated that the general rule applicable was "the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to." *Id.* at 63, 64. Governmental interference with these rights could only be tolerated to the extent that public concern and necessity required it.[27] Public concern must be oriented to the safety, health, morals and general welfare of the public.

In the instant case, neither the Secretary nor the First Circuit advanced a public necessity rationale to support the establishment of maximum wage rates and working conditions; nor could such a rationale be proffered without first establishing that maximum guidelines were necessary to prevent agricultural employers from going bankrupt. But no such record was established. Therefore, petitioners request this Court's review in order to clarify the right to contract for U.S. farmworkers.

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27. It is public necessity which supports minimum wage legislation. *See*, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Adkins v. Children's Hospital, 261 U.S. 525 (1923), dissenting opinion of Mr. Justice Holmes. *Adkins* was expressly overruled by *West Coast Hotel Co. v. Parrish.*

CONCLUSION

This petition presents important issues regarding the welfare of U.S. farmworkers. Unless this Court corrects the policies described herein, foreign labor will displace more and more U.S. farmworkers as employers realize that they may legally use foreign workers to keep wages and working conditions low. Therefore, a writ of certiorari should be issued to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF PUERTO RICO

REINALDO HERNANDEZ
FLECHA, et al.,
Plaintiffs

vs. CIVIL NO. 76-1382

HON. LUIS SILVA
RECIO, et al.,
Defendants.

OPINION AND ORDER

On July 21, 1977, we referred the above captioned case to the United States Magistrate for proceedings, report and recommendation of plaintiffs' motion for preliminary injunction. Said Report was filed on August 12, 1977, and the matter stands now submitted for our final decision as to whether a preliminary injunction shall be issued in this action.

ANALYSIS

FINDINGS OF FACT

The United States Magistrate has filed a very detailed recommendation as to the Findings of Fact to be made

in this case. After an independent study of the record of the case we hereby adopt said Findings of Fact as offered by the Magistrate and the same shall be part of this Opinion, as prescribed by Rule 52 of the Federal Rules of Civil Procedure.

CONCLUSIONS OF LAW

We are here faced with the question of whether or not this Court should issue temporary injunctive relief upon the above determination of facts. As stated by the U.S. Magistrate, the general doctrine in this regard is that for a court to issue a temporary injunction a showing must be made by plaintiffs that there is substantial likelihood that they will succeed on the merits and, more important, that irreparable harm would flow from a denial of their request. The Court must also have in mind the inconveniences that the granting of the preliminary injunction would cause the opposing party and the public interest involved. *Pauls v. Secretary of Air Force*, (1st Cir., 1972) 457 F.2d 294, 298; *State of Maine v. FRI* (1st Cir., 1973) 486 F.2d 713, 715.

The above enunciation of the law together with a consideration of the facts of the present case lead us to conclude that any delay in a determination of the question of whether Puerto Rican agricultural workers are available for the 1977 harvest will cause irreparable injury to some or all of the class of plaintiffs in this case inasmuch as it would reduce the number of Puerto Rican workers capable of being recruited. Plaintiffs have also pointed out that those workers that would not get

to be recruited for the 1977 harvest will lose wages without any opportunity of recovering them by suing the growers or the Department of Labor for lost wages (damages).

We agree with the U.S. Magistrate that plaintiffs herein have shown that they are likely to succeed on the merits of this matter under the holding of *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493 (1st Cir., 1974).

As stated in the Report now before us:

> "11) The balancing of the equities in this case in our opinion, leans toward the plaintiffs. They have everything to lose. As in the past two years, plaintiffs face the perspective of not being able to work in the coming harvest season. . . .
>
> 12) In our opinion, the public interest favors a decision granting the preliminary injunction. The public interest in this case is expressed in the Immigration and Nationality Act which states the premise that domestic workers are to be preferred for U.S. jobs over foreign workers. See *Elton Orchards v. Brennan*, supra at 500. To establish a ruling at this point which would put Puerto Rican workers in a position inferior to foreign workers would be to negate immigration law and policy."

We need not delve any further into the merits of the case at the present moment. An evaluation of the equities and a finding of a likelihood of plaintiff's success in the present case lead us to conclude that the temporary relief herein requested should be granted.

In view of all of the above, plaintiffs' motion for preliminary injunction is hereby GRANTED against the defendants enjoining the U.S. Secretary of Labor to declare the availability of Puerto Rican workers for the

1977 apple harvest with the full protections of Public Law 87 of 1962; the U.S. Secretary of Labor is further restrained from certifying any apple grower's request for the use of temporary foreign workers to harvest apples, unless available workers from Puerto Rico do not accept all the available job openings; the Commissioner of the Immigration and Naturalization Service is enjoined to recognize the availability of Puerto Rican workers for the 1977 apple harvest with the full protections of Public Law 87; the Commissioner of the Immigration and Naturalization Service is restrained from issuing visas to temporary foreign workers to harvest apples in the 1977 harvest unless available workers from Puerto Rico do not accept all available job openings. The above order against defendants shall remain in effect pending the determination of this action or until further order of this Court. In view of the fact that plaintiffs have been granted leave to proceed without prepayment of costs, they shall not be required to post a bond for the issuance of this order.

IT IS SO ORDERED.
San Juan, Puerto Rico, August 15, 1977.

/s/ Jose V. Toledo
JOSE V. TOLEDO
Chief U.S. District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 77-1401

REINALDO HERNANDEZ FLECHA et al.,
Plaintiffs, Appellees,

v.

HON. CARLOS QUIROS, etc.,
Defendant, Appellee.

F. RAY MARSHALL,
U.S. SECRETARY OF LABOR, et al.,
Defendants, Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[HON. JOSE V. TOLEDO, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
Aldrich, *Circuit Judge*,
and Crary, *District Judge*.*

Jonathan H. Waxman, Acting Counsel for Litigation, with whom *Carin Ann Clauss*, Solicitor of Labor, *Nathaniel Baccus III*, Associate Solicitor for Employment and Training, *Morton J. Marks*, Regional Attorney, *Mary Asseo* and *Steven M. Guttell*, Attorneys, were on brief, for appellants.

*Of the Central District of California, sitting by designation.

S. Steven Karalekas and *Thomas J. Bacas* on brief for Farm Labor Executive Committee, amicus curiae.

Luis N. Blanco Matos, with whom *Salvador Tio, Howard S. Scher, Burton D. Fretz*, and *Alan J. Rom* were on brief, for appellees.

December 28, 1977

Aldrich, *Senior Circuit Judge.* In this action for an injunction, and a declaration of rights, there has been a considerable past history that is sought to be used by the various parties to reflect on others. We disregard it as irrelevant, and turn to the single question of substance, which, we agree with plaintiff, appellees, is not moot. This is whether Puerto Rican workers, because of their special demands, are to be excluded from the pool of "available" domestic workers when determining the number of alien workers needed for certain migrant agricultural work. The district court issued a preliminary injunction requiring defendant United States Secretary of Labor, U.S. Secretary, to declare the Puerto Rican workers available, and enjoining defendant Commissioner of the Immigration and Naturalization Service, INS, from issuing temporary work visas. We stayed the injunction, and now consider the merits. Plaintiffs are agricultural workers residing in Puerto Rico. A further named defendant is the Puerto Rico Secretary of Labor, P.R. Secretary.

The problem arises in this manner. Certain private activities in the several states, in this instance apple growing in a number of Eastern states, require many temporary workers, here apple pickers, for a short and

specific interval. The demand often exceeds the local supply, and the growers look elsewhere, including abroad. We start with a given, that it has always been a Congressional policy to prefer domestic workers in all fields. However, it is also necessary to consider would-be employers, although in case of conflict, wide leeway favoring domestic workers is given the U.S. Secretary. *Elton Orchards, Inc. v. Brennan*, 1 Cir., 1974, 508 F.2d 493 (apple growers); *cf. Silva v. Secretary of Labor*, 1 Cir., 1975, 518 F.2d 301 (live-in maid). Domestic workers are preferred in the matter of hiring, so long as there are any "who are able, willing, qualified, and available." 8 U.S.C. §1182(a)(14)(A). In order further to protect domestic workers and their working conditions, as required by subsection (14)(B), employers of both domestic and alien workers are obliged to maintain certain minimum wage and other standards determined by the U.S. Secretary, hereinafter U.S. conditions. 8 U.S.C. §§1101(a)(15)(H)(ii), 1184(c) (1970); 20 C.F.R. §§602.10-10b (1977). At the same time, under the statute, employers are protected by permitting the admission of aliens when there is no supply of domestic workers who are "able, willing, qualified, and available." The question is whether a domestic worker who demands more than the U.S. conditions falls within this statutory definition.

The present difficulty was created by the Puerto Rico legislature's enactment of Public Law 87 of 1962, as amended in 1977, forbidding the P.R. Secretary to contract with the U.S. Secretary to release Puerto Rican residents for itinerant work except upon conditions, hereinafter P.R. conditions, more onerous to the employer than those set by the U.S. Secretary. Since

none could come without his permission, the P.R. Secretary's insistence upon these conditions led to a determination by the U.S. Secretary that no Puerto Rican workers were "available." The U.S. Secretary accordingly computed the quotas of apple pickers without reference to Puerto Rico. Plaintiffs responded with this suit, and obtained the preliminary injunction which we stayed.

Plaintiffs, at the outset, contend that P.L. 87 and its constitutionality are not involved. In a sense, this is so. The basic fact which the U.S. Secretary faced was the simple one that no Puerto Rican worker would come unless the employer agreed to meet conditions exceeding the U.S. conditions. We may agree with plaintiffs that the reason why is purely secondary: the question is the same whether the Puerto Rican workers' insistence upon P.R. conditions was made for them by the legislature, or by the P.R. Secretary, or was due to insistence by a union to which they all belonged, or was merely the result of Puerto Rican workers not finding the U.S. conditions sufficiently attractive, and demanding more on an individual basis. Our decision covers all these matters, and the statute only incidentally.

It is plaintiffs' position that the U.S. conditions are merely a minimum, and that they neither forbid employers offering more, nor employees from seeking more. We agree with this, but it does not follow, as plaintiffs would seem to think, that if the workers are unwilling—or unable—to come unless they receive more, they meet the section 1182(a)(14)(A) definition. If they did, it requires but little reflection to see that the statute would be used to require employers to meet

whatever demands might be made by domestic workers. The effect, indeed, the necessary effect, would be that the alien market would never be reached—the employer would have to pay whatever the domestic workers sought, it being obvious that if there were no limit on the price that could be asked, workers could always be found. In fact, the right of workers to demand what they wish is the whole basis of plaintiffs' claim—that the U.S. Secretary's interpretation means that "the [U.S.] Secretary usurps the power of the domestic worker to negotiate. . . ."[1]

The statute, however, is not a one-way street. The Court of Appeals for the Third Circuit, recently faced with a somewhat similar situation in the Virgin Islands, recognized that there are two statutory purposes.

> "The common purposes are to assure [employers] an adequate labor force on the one hand and to protect the jobs of citizens on the other. Any statutory scheme with these two purposes must inevitably strike a balance between the two goals. Clearly, citizen-workers would best be protected and assured high wages if no aliens were allowed to enter. Conversely, elimination of all restrictions upon entry would most effectively provide employers with an ample labor force." *Rogers v. Larson*, 3 Cir., 1977, 563 F.2d 617, 626.

The attmpt in plaintiffs' brief to read the statute otherwise is based upon the claim that since the Puerto Rican workers are fully prepared to go if the P.R. conditions are met, they are "ready, willing and able,"

[1] "Negotiate" here means only negotiate up. A recent Puerto Rico Superior Court decision denies power to negotiate away any of the P.R. conditions. *Villanueva v. Quiros*, Civil No. PE 77-1304 9/26/77.

and hence are "available."[2] Quite apart from conflicting with what we regard as the statute's intent, this is giving the work "willing" an unnatural meaning. A person who is willing only if certain conditions are met is not "willing and available." On the contrary, by hypothesis, he *would be willing, if.* To carry plaintiffs' ignoring conditions to its logical extent, we ask whether the cynic who said that every man has his price would say that every man is "willing and available"? If so, the phrase is meaningless. If not, the injection of any condition is a denial of ready willingness; there is no intermediate position.

We assume, for present purposes only, that Puerto Rico can forbid its residents to accept employment elsewhere except upon conditions determined by Puerto Rico. Even so, Puerto Rico cannot pass laws, such as minimum wage laws, for other jurisdictions. The Puerto Rico legislature may be dissatisfied with the U.S. standards, but it cannot reject those standards and at the same time insist on the benefits of the federal statute. The purpose of the statute and regulations relating to temporary workers is not to open the door for bargaining nationwide—if by Puerto Rico, it could be by every state—but to provide a manageable scheme, which that clearly would not be, that is fair to both sides. Puerto Rico may participate, or not, as it chooses, but it cannot set the terms. It is Congress which, under the Constitution, has the final say in matters of interstate commerce, and its lawfully

[2] "Puerto Rican workers were, in fact, 'available' to do apple harvest work because they were physically ready, willing and able to do such work."

delegated agencies that determine fair conditions of employment in interstate commerce, and neither Puerto Rico, nor any individual state.

There remains the question of relief. Technically, this is an appeal from the granting of a preliminary injunction. With the passage of the 1977 apple season, the granting of that injunction is obviously mooted. What is not mooted is the meaning of the federal statute and regulations, and since this is a question of law, not of fact, we may decide the merits. The case is remanded to the district court to enter a judgment in an appropriate form declaring that a worker who is not able and willing to enter into a contract of employment upon the U.S. conditions is not available within the statutory meaning when the U.S. Secretary is certifying the need for temporary foreign workers to the INS.

APPENDIX C

1. 8 U.S.C. §1101(a)

As used in this chapter–

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens–

* * * *

(H) an alien having a residence in a foreign country which he had no intention of abandoning. . . .

* * * *

(ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country;

2. 8 U.S.C. §1184(c)

The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

3. 29 U.S.C. §49 *et seq.* (pertinent text only):

a. §49. United States Employment Service; bureau established; transfer of records, employees, etc., of existing employment service

In order to promote the establishment and maintenance of a national system of public employment offices there is created a bureau to be known as the United States Employment Service.

b. §49b. Employment offices; development of national system; veterans' service; "State" defined

(a) It shall be the province and duty of the bureau to promote and develop a national system of employment offices for men, women, and juniors who are legally qualified to engage in gainful occupations, including employment counseling and placement services for handicapped persons, to maintain a veterans' service to be devoted to securing employment for veterans, to maintain a farm placement service, and, in the manner hereinafter provided to assist in establishing and maintaining systems of public employment offices in the several States and the political subdivisions thereof in which there shall be located a veterans' employment service. The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and

publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States.

(b) Whenever in sections 49 to 49c, 49d, 49g, 49h, 49j, and 49k of this title and section 338 of Title 39 the word "State" or "States" is used, it shall be understood to include Puerto Rico, Guam, the District of Columbia, and the Virgin Islands.

4. 8 C.F.R. §214.2(h)(3) (pertinent text only):

Petition for alien to perform temporary service or labor—(i) *Labor certification.* Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a) (15) (H) (ii) of the Act. A certification by the Employment Service of the Territory of Guam will be accepted in lieu of that issued by the Secretary of Labor or his designated representative in connection with a petition for employment of laborers in Guam. If there is attached to the petition a notice from the Secretary of Labor or his designated representative that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the

United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

5. 20 C.F.R. §§602-602.10b (pertinent text only):

a. §602.2 Placement services.

(a) *Functions.* Each State Agency shall maintain, through its State and local employment offices, a placement service for the free use of employers, workers, and veterans and for the purpose of assisting employers to secure the number of workers possessing the occupational qualifications such employers require, and of assisting all workers to find promptly, jobs for which they are occupationally qualified and which are most advantageous to them. The State service shall promote the full use of its placement facilities, for the purpose of assuring the maximum of job opportunities for veterans and other workers and the maximum recruitment and placement assistance for employers.

* * * *

(c) *Inter-area and interstate clearance of labor.* Each State agency shall cooperate with the United States Employment Service in the interstate recruitment and transfer of workers. Each State agency shall maintain an adequate system for the recruitment and transfer of workers between areas within the State.

* * * *

b. §602.8 Agricultural and related industry placement services.

(a) Each State agency, in carrying out the provisions of the Wagner-Peyser Act, shall maintain, through its State administrative office and local employment offices, effective placement services for agricultural and related industry employers and workers, and such services shall include appropriate programs for the intrastate recruitment and transfer of workers and for cooperation with the United States Employment Service in the interstate recruitment and movement of workers.

d. §602.10 The certification processes.

(a) Section 214.2(h)(3) of the Immigration and Naturalization Service Regulations (8 CFR 214.2(h)(3)) requires, in support of a petition for the admission of an alien to perform certain temporary service or labor, that

> Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a) (15) (H) (ii) of the Act.

* * * *

(b) Agricultural or logging employers including association employers anticipating a labor shortage may

request a certification for temporary foreign labor, provided that the employer or the association and those of its members for whom the services of foreign workers are requested, prior to making such a request, have filed at the local office of the State employment service an offer of employment for U.S. workers to fill such employment needs in accordance with the provisions of this section and §§602.10a and 602.10b. Such offers of employment, as well as any request for certification for temporary foreign workers, should be filed at the local office in sufficient time to allow the ETA 30 days to determine the availability of domestic workers, in addition to the time necessary for the employer to secure foreign workers by the date of need if the certification is approved.

(c) Request for certification shall be in writing and describe all efforts made by the employer to obtain U.S. workers to fill the employer's need.

(d) When received, the request for certification shall be forwarded by the local office of the State employment service to the appropriate RAETA together with information which indicate the extent to which the requirements set forth in this section have been met and a detailed report of labor availability, recruitment efforts undertaken by and on behalf of those requesting the use of foreign workers, and any other information required by the ETA. The RAETA may then issue the certification if he finds:

(1) That the employment of such workers will not adversely affect the wages and working conditions of domestic workers similarly employed; and

(2) That reasonable efforts have been and will continue to be made by the Employment Service and

the employers to obtain domestic workers at wage rates and conditions of employment no less favorable than those set forth in the regulations in this part, to perform the work for which the services of temporary foreign workers are requested, and for which domestic workers are not available.

* * * *

e. **§602.10a Job offers and contracts.**

The offers to U.S. workers made in accordance with this section and §602.10(b) shall:

(a) Be in writing (except with regard to workers who commute on a daily basis between their residence and the place of employment) and when accepted shall take the form of a written contract.

* * * *

(b) Provide for housing for the employees without charge in accordance with the standards issued by the Secretary of Labor as set forth in §602.9. If the prevailing practice in the area of employment is to provide family housing, such housing must be provided;

* * * *

(c) Provide, at no cost to workers for insurance covering injury and disease arising out of and in the course of the workers' employment where such workers are not covered by workmen's compensation under State law.

* * * *

(d) Provide for the furnishing of all tools, supplies or equipment required to perform the duties assigned without cost to the worker;

* * * *

(e) Permit only the following deductions from wages: (1) Those required by law; (2) those for advance against wages; (3) payment for articles of consumption produced by the employer which the worker has purchased; (4) value of meals supplied by the employer but not to exceed amounts specified in paragraph (f) of this section; (5) overpayment of wages; (6) any loss to the employer due to a worker's refusal or negligent failure to return any property furnished to him by the employer, or due to such worker's willful destruction of such property; (7) deductions for transportation and subsistence costs paid for by the employer as provided in paragraph (g) of this section.

* * * *

(f) Permit no charge by the employer in excess of $2.55 per worker for furnishing 3 meals per day except where the Administrator, when evidence submitted to him of average actual cost for a representative pay period supports a greater charge, has approved a charge not to exceed $4.00 per worker for furnishing three meals per day.

* * * *

(g) Require the employer to provide or pay for transportation and subsistence en route from the place of recruitment to the place of employment in those cases where the worker completes at least 50 percent of the contract.

* * * *

(h) Guarantee each worker the opportunity for employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the worker's arrival at the place of employment and ending on the termination date specified in the work contract, or its extensions, if any.

* * * *

(j) Provide for the payment of not less than the wage rates prescribed in §602.10b.

f. **§602.10b Wage rates.**

(a)(1) Except as otherwise provided in this section, the following hourly wage rates (which have been found to be the rates necessary to prevent adverse effect upon U.S. workers) shall be offered to agricultural workers in accordance with §602.10a(j):

State:	*Rate*
Connecticut	
Florida (sugar cane only)	
Maine	
Maryland	
Massachusetts	
New Hampshire	
New York	
Vermont	
Virginia	
West Virginia	

(2) Piece rates shall be designed to produce hourly earnings at least equivalent to the hourly rate specified

in subparagraph (1) of this paragraph for the State in which the work is to be performed and no workers shall be paid less than the specified hourly rate.

(b) Where the prevailing rate for a crop activity in an area of employment is higher than the wage rate otherwise applicable under paragraph (a)(1) of this section, such higher prevailing rate shall be offered and paid.

* * * *

(e) Upon application to, and approval by, the Secretary of Labor in each case, an agricultural employer may use piece rates which are designed to, and do, produce earnings by his employees engaged in the type of work covered by the job offer or contract, the average of which for the weekly or biweekly period is 25 percent higher than the hourly rates applicable under paragraph (a) of this section for agricultural workers. Should the average of the hourly earnings of such employees fall below this requirement, each worker's earnings for each payroll period within such weekly or biweekly period must be increased by the percentage needed to bring the total average to this requirement.

(f) Where both U.S. and foreign workers are engaged in the same tasks, wage rates that favor one such group and thereby discriminate against the other may not be paid.

No. 77-1356

In the Supreme Court of the United States

OCTOBER TERM, 1977

REINALDO HERNANDEZ FLECHA, ET AL., PETITIONERS

v.

F. Ray MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1977. The petition for a writ of certiorari was filed on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Labor, in determining whether to approve the importation of temporary agricultural labor from foreign countries, may properly find that a domestic worker from Puerto Rico who is not able and

willing to accept an offer of employment fully satisying the federally established minimum conditions is not "available" for that employment.

STATEMENT

In the fall of each year the apple harvest on the east coast requires the labor of a large number of temporary workers to work as apple pickers for a short and specified interval (Pet. App. 2b-3b). The demand for pickers often exceeds the local supply and the apple growers look elsewhere, including abroad, for workers. While preference is given to domestic workers in all hiring, a federal statutory and regulatory mechanism has been adopted which provides for the hiring of temporary foreign workers if domestic workers are not available.

This federal statutory and regulatory scheme is as follows: 8 U.S.C. 1101(A)(15)(H)(ii) provides that the term "immigrant" shall not include an alien who does not intend to abandon his foreign residence and "who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1184(a) provides, in turn, that the admission of nonimmigrant aliens to this country shall be under "such conditions as the Attorney General may by regulations prescribe," and 8 U.S.C. 1184(c) provides that "[t]he question of importing any alien as a nonimmigrant * * * shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer."

By regulation, the Attorney General has provided that every petition for the importation of nonimmigrant alien labor shall be accompanied by a certification by the Secretary of Labor or his designated representative that

"qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed * * *." 8 C.F.R. 214.2(h)(3). The Secretary of Labor has promulgated regulations governing such certifications (20 C.F.R. 602.10, 602.10a, 602.10b). These regulations in essence require that an employer seeking certification of alien workers must file his offer of employment for U.S. workers at his local state's employment service sufficiently in advance to allow 60 days for determination of the availability of domestic workers (20 C.F.R. 602.10 (b)). These offers must at least meet the minimum terms of employment established by the Secretary of Labor, including the wage rate determined to be "necessary to prevent adverse effect on U.S. * * * workers" (20 C.F.R. 602.10(b), 602.10a, 602.10b(c)).

A Puerto Rican statute, however, bars the Secretary of Labor of Puerto Rico from releasing Puerto Rican residents for itinerant work except pursuant to a "wage-benefit package" which requires more of the employer than the terms prescribed by the Secretary of Labor of the United States (Laws of Puerto Rico, Act No. 87 of June 22, 1962, as amended in 1977 (2d Regular Sess. 1962)). When the Commonwealth Secretary of Labor was unable to negotiate a contract with the apple growers on those special terms, petitioners, Puerto Rican agricultural workers, sought a preliminary injunction in the United States District Court for the District of Puerto Rico. On August 15, 1977, such an injunction was issued, ordering the United States Secretary of Labor to "declare the availabilty of Puerto Rican workers for the 1977 apple harvest with the full protections of Public Law 87 of 1962," thus precluding the certification for admission of temporary foreign workers for that task (Pet. App. 3a-4a).

The court of appeals stayed the preliminary injunction, however, and subsequently ruled on the merits in this case "that a worker who is not able and willing to enter into a contract of employment upon the U.S. conditions is not available within the statutory meaning when the U.S. Secretary is certifying the need for temporary foreign workers * * *" (Pet. App. 7b).[1]

ARGUMENT

There is no merit to petitioners' claim that the Secretary has misinterpreted the applicable regulations and should recognize Puerto Rican workers as "available" for work in the apple harvest despite the fact that their demands exceed what the growers are willing to offer and what they are required to offer under the federal regulations.

The purpose of the statutory scheme is to strike a proper balance between assuring the employer "an adequate labor force on the one hand and to protect the jobs of citizens on the other." See *Rogers* v. *Larson*, 563 F. 2d 617, 626 (C.A. 3). As the court of appeals recognized, if domestic workers were declared to be available whatever their demands might be, which is the logical result of petitioners' position, the necessary effect "would be that the alien [labor] market would never be reached—the employer would have to pay whatever the domestic workers sought, it being obvious that if there were no

[1]The court of appeals did not decide the case until December 28, 1977, well after the 1977 apple harvest had been concluded, and the court recognized that, as a technical matter, the appeal of the preliminary injunction was moot. Apparently because of the recurring nature of the problem, however, the court proceeded to dispose of the legal issue involved on the merits. See *United States* v. *New York Telephone Co.*, No. 76-835, decided December 7, 1977, slip op. 5 n. 6.

limit on the price that could be asked, workers could always be found" (Pet. App. 5b).[2] In these circumstances, the court below quite properly declared that the United States Secretary of Labor could certify that no domestic workers are available when no domestic workers are able and willing to accept the job under conditions fully meeting the requirements of federal law, without regard to the additional conditions of Puerto Rican law.[3]

Petitioners also argue (Pet. 11-15) that by allowing the admission of foreign workers the United States Secretary of Labor impermissibly interferes with the right of domestic workers to bargain and contract with

[2]The Secretary of Labor has no authority to set a wage rate "high enough to attract those domestic workers not otherwise willing to work." *Williams* v. *Usery*, 531 F. 2d 305, 307 (C.A. 5).

[3]In so deciding, the court below also correctly rejected the corollary proposition that the requirements of Puerto Rico's statutes could govern the implementation of the federal plan (Pet. App. 6b-7b):

> * * * Puerto Rico cannot pass laws, such as minimum wage laws, for other jurisdictions. The Puerto Rico legislature may be dissatisfied with the U.S. standards, but it cannot reject those standards and at the same time insist on the benefits of the federal statute. The purpose of the statute and regulations relating to temporary workers is not to open the door for bargaining nationwide—if by Puerto Rico, it could be by every state—but to provide a manageable scheme, which that clearly would not be, that is fair to both sides. Puerto Rico may participate, or not, as it chooses, but it cannot set the terms. It is Congress which, under the Constitution, has the final say in matters of interstate commerce, and its lawfully delegated agencies that determine fair conditions of employment in interstate commerce, and neither Puerto Rico, nor any individual state.

agricultural employers.[4] This is incorrect. While the potential admission of temporary foreign workers means that domestic workers are not the exclusive source of labor, this in no way precludes domestic workers from negotiating and contracting with employers under the statutory and regulatory plan governing certification; nor is the Secretary barred from changing those regulations where the standards of employment change. Indeed, as previously noted, domestic workers are always afforded preference in the hiring system. 20 C.F.R. 602.10; see *Elton Orchards, Inc.* v. *Brennan,* 508 F. 2d 493, 500 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
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Attorneys.

MAY 1978.

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[4]To the extent that petitioners rely on the National Labor Relations Act, 61 Stat. 151, 29 U.S.C. 151 *et seq.*, it should be observed that agricultural laborers are specifically exempted from the coverage of the Act by the provisions of 29 U.S.C. 152(3).

DOJ-1978-05

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-1356

REINALDO FLECHA, *et al.*,
Petitioners,

vs.

F. RAY MARSHALL and LEONEL CASTILLO,
Respondents.

BRIEF OF UNITED FARM WORKERS OF AMERICA, AFL-CIO AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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SUBJECT INDEX

SUBJECT INDEX (cont')

SUBJECT INDEX (cont')

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (cont')

TABLE OF AUTHORITIES CITED (cont')

TABLE OF AUTHORITIES CITED (cont')

TABLE OF AUTHORITIES CITED (cont')

Hearings

TABLE OF AUTHORITIES CITED (cont')

Other Authorities

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STATEMENT OF INTEREST.

This brief *amicus curiae*, submitted by the consent of the parties,[1] is filed

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[1]The original letters of the parties consenting to the submission, *amicus*
[footnote continued on next page]

on behalf of the United Farm Workers of America, AFL-CIO,[2] a labor association formed and maintained for the purpose of organizing and representing workers employed in agriculture. In the approximate fifteen years of its existence, the United Farm Workers has expanded from a small group of farm workers seeking better wages and working conditions to a nationwide organization successful in the organization of this hithereto unrepresented and deeply divided segment of the American workforce. From the inception of the United Farm Workers, its primary goals have been the advancement of wages and working conditions in agriculture through worker self-organization and collective bargaining and the betterment

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[1][footnote continued from previous page] *curiae* (Rule 42(1), Rules of the Supreme Court), of a brief on behalf of the United Farm Workers of America, AFL-CIO are being submitted to the Clerk contemporaneous with the submission of this brief for filing.

[2]Hereinafter referred to as "United Farm Workers".

of the living conditions for those working in the Nation's fields.

Although not immediately involved in the dispute giving rise to this action,[3] the decision of the Court of Appeal[4] necessarily affects the ability of the United Farm Workers to organize in the agricultural sector and undermines advancements in wages and working con-

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[3]The United Farm Workers is, however, actively affiliated with the Asociacion de Trabajadores Agricolas de Puerto Rico, a labor organization formed by Puerto Ricans working in the Continental United States pursuant to agreements between growers and the Puerto Rican government. (See, *In re Asociacion de Trabajadores Agricolas de Puerto Rico*, 376 F.Supp. 357-358 (D. Del. 1974), *aff'd sub nom. Asociacion de Trabajadores, Etc. v. Green Giant Co.*, 518 F.2d 130 (3rd Cir. 1975).) Because of this affiliation, the outcome of this action will directly influence the United Farm Workers' organizational efforts.

[4]Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit, *Reinaldo Recha, et al. v. F. Ray Marshall and Leonel Castillo*, (No. 77-1356, filed March 24, 1978; hereinafter referred to as "Petition"), Appendix B. The decision is reported at 567 F.2d 1154.

ditions fought for and won by workers the United Farm Workers represents. Such adverse consequences will follow ineluctably if the Court of Appeals' decision stands, for in practical effect, it endows the Secretary of Labor[5] with the power to dictate wage rates and working conditions for farmworkers engaged in agricultural production. Such a result not only contravenes basic public policy, but debilitates efforts by the United Farm Workers to secure improvement in the historically low wages and dangerous working conditions imposed upon the agricultural workforce.

Because both the immediate and potential future consequences of the Court of Appeals' decision weakens nascent organization of the agricultural sector, the United Farm Workers submits this brief in support of the Petition filed in this action.

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[5]Hereinafter, the Secretary of Labor will be referred to as "Secretary".

QUESTIONS PRESENTED.

1. Whether the United States Secretary of Labor and the United States Commissioner of the Immigration and Naturalization Service have violated the Immigration and Naturalization Act, 8 U.S.C. §1101 *et seq.*, by construing that Act and the regulations promulgated thereunder so as to deem unavailable for employment all United States workers who seek wages and working conditions higher than those minima contained in the foreign worker regulations at 20 C.F.R. §§602.10-.10b?

2. Whether the above construction interferes with the right of United States workers to bargain with their employers over wages and working conditions, as guaranteed by the United States Constitution and federal and state law.

SUMMARY OF ARGUMENT.

The H-2 program,[6] an outgrowth of

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[6]Section 101(a)(15)(H)(ii) of the

war-created labor shortages has, through years of substantial unemployment, been utilized to permit the importation of low-cost labor. Not only has the continuance of the program under the Secretary's indifferent administration displaced domestic workers and retarded increases in wages in the agricultural sector, but recent judicial decisions, including the one under review here, have paved the way for increased importation of "temporary" labor.

The increased utilization of H-2 workers has recently become a spectre overshadowing the organizational aims and efforts of *amicus curiae* United Farm

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Immigration and Naturalization Act (set forth at Petition, Appendix C, p. 1c; hereinafter the Immigration and Naturalization Act, 8 U.S.C. §1101 *et seq.*, 66 Stats. 166 (1952) is referred to as "INA"), 8 U.S.C. §1101(a)(15)(H)(ii) provides for admission of aliens temporarily for purposes of performing labor where capable domestic residents cannot be found. In large part, nonimmigrants admitted under this program have been engaged to perform agricultural or logging work. (Cf. 20 C.F.R. §602.10(a).)

Workers. The Secretary has announced Administration contemplation of a five-fold expansion of the H-2 program. And, the decision of the Court of Appeals giving rise to the instant Petition significantly expands those circumstances in which admission of nonimmigrants can displace domestic workers. This expansion effectively undermines clear Congressional safeguards intended to drastically limit the permissible use of non-domestic "temporary" labor.

The decision of the Court of Appeals significantly departs from the standards judicially established in the area of labor certification and ignores both Congressional intent and established administrative regulation. Summarily stated, the applicable statute and implementing regulations require, prior to admission of nonimmigrant workers, that the Secretary determine the "availability" of domestic workers to fill the jobs and establish a wage which will not undermine wages paid domestic workers. This two-fold scrutiny precludes, ideally, the admission of nonimmigrant labor displac-

ing or injuring domestic workers. The Court of Appeals undermines this protection in holding, erroneously, that the "availability" determination is subsumed under the "adverse wage impact" evaluation. This collapsing of a double shield against displacement of domestic workers cannot legally or logically be sustained.

In addition to being analytically unsupportable, the decision of the Court of Appeals, if allowed to stand, signigicantly interferes with the organization and representation of agricultural workers. In its evisceration of the protections accorded domestic workers, the Court of Appeals specifically sanctions use of the H-2 program in circumstances where workers seek, through collective organization, to better their terms and conditions of employment. In practical effect, the Court's decision sanctions use of H-2 workers to break strikes. Such an effect spells the end to incipient farmworker organization, thus permitting agricultural employers to maintain historically low wages and

abysmal working conditions.

The Petition in this action should be granted to affirm and reinstate the clearly-mandated protection of domestic workers from displacement by nonimmigrant labor and prevent the substantial departure by the Court of Appeals from established precedent. The issues raised herein become particularly significant when viewed in terms of Respondent Marshall's announced intent to expand the nonimmigrant workforce in agriculture. If this Court fails to restore the protective barriers against nonimmigrant labor breached, if not destroyed, by the Court of Appeals, not only will organization and improvement in the conditions of the agricultural workforce be drowned in its infancy, but clear Congressional purpose will have been effectively avoided.

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I

THE DECISION OF THE COURT OF APPEAL, IN ESTABLISHING AS A STANDARD FOR CERTIFICATION OF TEMPORARY LABOR THE AVAILABILITY OF DOMESTIC WORKERS WILLING TO WORK AT THE SECRETARY'S ADVERSE IMPACT WAGE, IGNORES CONGRESSIONAL INTENT AND CONTRARY DECISIONS BY COURTS OF APPEALS. REVIEW SHOULD BE GRANTED TO INSURE THE ADMINISTRATION OF THE H-2 PROGRAM IN CONFORMITY WITH CONGRESSIONAL MANDATE.

This case brings before this Court significant issues raised by the statutory authorization for temporary admission of nonimmigrant workers, § 101(a)(15)(H)(ii) of the INA; 8 U.S.C. § 1101(a)(15)(H)(ii) and § 214(c) of the INA; 8 U.S.C. § 1184(c), and implementing regulations (8 C.F.R. § 214.2(h)(3) and 20 C.F.R. §§ 602.10-602.10b.[7] This action

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[7]For a discussion and review of this statutory and administrative framework, see *Rogers v. Larson*, 563 F.2d 617, 622 *et seq.* (3rd Cir. 1977) and *Elton*

originated following the Secretary's certification of temporary nonimmigrant labor to harvest apples, jobs domestic workers were willing to accept and available to perform. (Petition, pp. 3-6.)

In upholding this certification, which effectively displaced domestic workers, the Court of Appeals reasoned that a domestic worker, in order to avoid unemployment occasioned by importation of nonimmigrant labor, had not only to be available for the relevant employment, but also to accept those wages dictated by the Secretary. The conclusion of the Court of Appeals is succinctly stated in its operant language:

> "The case is remanded to the district court to enter a judgment in an appropriate form declaring that a worker who is not able and willing to enter into a contract of employment upon the [conditions, including wages, set forth in 20 C.F.R. §§ 602.10-602.10b] is not available within the statutory meaning when the U. S. Secre-

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Orchards, Inc. v. Brennan, 508 F.2d 493, 495-96 (1st Cir. 1974).

> tary [of Labor] is certifying the need for temporary foreign workers to the [Immigration and Naturalization Service]."

Petition, p.7b; 567 F.2d at 1157. This conclusion annoints the Secretary with the authority and power to dictate the maximum wage to be received by domestic workers and to sanction importation of nonimmigrant labor whenever, and by whatever means,[8] domestic workers refuse to accept the dictated wage.

This result frustrates the extremely proscribed conditions in which the Attorney General, and by delegation the

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[8]The Court of Appeals expressly noted that its decision reached to encompass whatever means domestic workers utilized in seeking better wages and working conditions. (Petition, p. 4b; 567 F.2d at 1155-56.) Thus, if workers went on strike for conditions exceeding those established by the Secretary, nonimmigrant laborers could and should be certified for admission. Not only does this result mock the statutory protection of domestic labor, but it frustrates basic national policy. (See discussion, Section II A, *infra*.

Secretary,[9] by statute may permit importation of nonimmigrant temporary labor. Despite congressional appreciation for the potential need for temporary nonimmigrant workers, the statutory language sanctions their admission only in the most extreme circumstances, to wit, where no domestic workers are available. The decision of the Court of Appeals ignores this obvious intent.

In its blindness to congressional intent and the applicable regulations, the Court of Appeals significantly departs from prior decisions and creates

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[9]The Attorney General, and by delegation the INS, are, pursuant to § 214(c) of the INA, 8 U.S.C. § 1184(c) primarily responsible for certification of temporary nonimmigrant labor admissable under § 101(a)(15)(H)(ii) of the INA, 8 U.S.C § 1101(a)(15(H)(ii). *Castaneda-Gonzalez v. Immigration and Naturalization Service*, 564 F.2d 417, 424 (D.C. Cir. 1977; *dictum*.) Although this primary responsibility lies with the Attorney General, regulations delegate the primary role in the certification process under § 214(c) of the INA, 8 U.S.C. § 1184(c) to the Secretary. (8 C.F.R. § 214.2(h)(3).)

a conflict with other decisions examining and construing the certification process. Prior to the Court of Appeals' decision in this action, courts had consistently divorced the determination of the "availability" of foreign workers from any examination of the adverse effect on domestic workers of the wage to be paid to the immigrants. This conflict will only further exacerbate inconsistencies in decisions concerning applicable standards in labor certification.

A. The Court Of Appeals' Decision Ignores Unambiguous Congressional Intent.

An understanding of Congressional intent in its enactment of the H-2 program can best be evaluated in the context of the origins of the contract labor (H-2) system. With such a focus, the strong statutory protection for domestic workers and limitation of importation of contract labor to only the most desperate circumstances stands in stark contrast to the significant potential expansion

of the H-2 program erroneously written by the Court of Appeals in this action.

1. The Historical Background.

The use of nonimmigrants in the Nation's harvest arose in severe labor shortages artificially created by the manpower demands of the military effort during World War II. Yet, with the end of the War, the use of contract labor did not cease; apparently fearful of labor shortages, growers sought to maintain a steady flow of nonimmigrant labor. (See, Kramer, *The Offshores: A study of Foreign Farm Labor in Florida*, (St. Petersburg, Florida; Community Action Fund, 1966) p. 3, cited in *North American Congress on Latin America Report on the Americas*, Vol. XI, No. 8, "Caribbean Migration" (New York, 1977), p. 11.) The efforts to maintain a non-domestic labor force resulted in establishment of the "Bracero" program (§ 501 *et seq.* of Public Law 78, 65 Stats. 119 as codified at 7 U.S.C. § 1461 *et seq.*) in 1951 and the following year, the INA's provision for importation of contract

labor was enacted. (Section 101(a)(15)(H)(ii) of the INA, 66 Stat. 166, codified at 8 U.S.C. § 1101(a)(15)(H)(ii).) Both these enactments restricted the use of contract labor so as to preclude adverse effects upon domestic workers.

Subsequently, Congress has consistently reaffirmed its intent to avoid adverse impact upon domestic workers resulting from use of nonimmigrant labor. After consideration of amendments of the Bracero program (see, T. Richard Spradlin, "The Mexican Farm Labor Importation Program - Review and Reform", 30 G. Wash. L. Rev. 84, 99 *et seq.*), were unsuccessful in Congress (*Id.*, 30 G. Wash. L. Rev. 311 *et seq.*), the Bracero program was allowed to lapse. (7 U.S.C.A. (West Pub. Co., 1973) § 1461 *et seq.*) In 1965, after recognition of the ineffectiveness of the labor certification program established to prevent immigration of aliens whose residency would adversely affect American workers (see, § 212(a)(14) of the INA, Act of June 27, 1952, Ch. 477, § 212(a)(14), 66 Stat. 183), the section was amended to require the alien to

hurdle a presumption against the propriety of labor certification. (*Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761-762 (D.C. Cir. 1974).) The purpose of the amendment, as stated by Senator Song, was "the protection of the American economy and the wages and working conditions of American Labor." (111 Cng. Record 24463 (1965).) This concern for protection of the domestic worker has remained a subject of substantial concern:

> "Whatever future amendments the Congress may make in the immigration law, it must not lose sight of the fact that its first responsibility is to protect domestic workers from adverse foreign competition."
>
> Hon. Peter Rodino, Jr., "The Impact of Immigration on the American Labor Market", 27 Rutgers L. Rev. 245, 274 (1974).

Indisputably, the clear intent of Congress has been protection of domestic workers from adverse consequences flowing from admitting non-domestic workers to the labor force. This intent clearly circumscribes the permissable use of the

H-2 program.

2. The H-2 Program.

Section 101(a)(15)(H)(ii) of the INA, 8 U.S.C. § 1101(a)((15)(H)(ii) prescribes the permissable circumstances for introducing temporary foreign workers into the American labor market. This section permits admission of temporary workers only "if unemployed persons capable of performing [temporary] service or labor cannot be found *in this country*." [Emphasis added.] Only if *no* workers are available may the H-2 program be invoked.[10]

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[10]Although the regulations of the INS adopted to implement the H-2 program are not here challenged (see discussion, Section IB, *infra*), the difference in the statutory language establishing the H-2 program when compared to certification of immigrants under § 212(a)(14) of the INA, 8 U.S.C. § 212(a)(14) must be read to more significantly restrict permissable use of H-2 certification. (Compare § 101(a)(15)(H)(ii) of the INA, 8 U.S.C § 1101(a)(15)(H)(ii) with § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14). While under § 212(a)(14) of the INA, 8 U.S.C.

The strong Congressional mandate against use of the H-2 program to displace or injure domestic workers has been duly noted:

> "We recognize . . . that there may be good reason for [the growers'] wish to be able to rely upon the experienced crews of [nonimmigrant labor] who have performed well in the past, but there that preference collides with the mandate of a Congressional policy. To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible."
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> *Elton Orchards, Inc. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974)

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§ 1182(a)(14) only the immediate area need be searched for available labor (*Ramani v. Secretary of Labor*, 430 F. Supp. 298, 300 (S. D. Fla. 1976); *Jadeszko v. Brennan*, 418 F.Supp., 92, 94 (E.D. Penn. 1976)), the H-2 program mandates the United States as the appropriate labor pool.

3. The Court of Appeal's Decision Undermines The Intent Of The H-2 Program.

The decision of the Court of Appeals in this action effectively mocks this clear Congressional intent to limit the circumstances in which the H-2 program may be utilized. In effect, it allows the importation of nonimmigrant workers upon the mere unwillingness of domestic workers to accept wages dictated by the Secretary.

In its decision, the Court of Appeals held that nonimmigrants could be admitted under the H-2 program where domestic workers were unavailable to work at the wages established by the Secretary as set forth in 20 C.F.R. § 602.10b (a)(1). (Petition, p. 7b; 567 F.2d at 1157; quoted *supra* at 11.) In so holding, the Court effectively states a maximum wage rate for domestic workers, for if domestic workers refuse the Secretary's wage, nonimmigrants may permissably be imported via the H-2 program. This necessarily displaces, in conflict with the strong protection of

domestic workers stated in the immigration laws, a substantial portion of the domestic workforce, i.e., all those workers willing to work at a wage above that dictated by the Secretary. This result clearly ignores and contravenes the condition that H-2 workers can be admitted only if "unemployed persons capable [of working] cannot be found ..." (Section 101(a)(15(H)(ii) of the INA; 8 U.S.C. § 1101(a)(15(H)(ii).)

Widespread application of the Court's rationale could mark the end of domestic labor performing temporary services of labor. All that need be established to begin such a process would be the designation of wages or working conditions the Secretary believes[11] domestic workers

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[11] In testimony before the House, Daniel Sturt of the Regional Manpower Administration, Department of Labor defined the wage rates set forth in 20 C.F.R. § 602.10b(a)(1) as "those rates which the Department of Labor *believes* should be paid to foreign and domestic workers." (*Oversight Hearings on Department of Labor Certification of Offshore Labor Before the House Committee on Education*

should accept. If insufficient workers accept these wages, or if, through collective bargaining, more substantial benefits are sought, nonimmigrants could be imported. The mere statement of this consequence indicates the Court of Appeals' total disregard of the Congressionally-mandated protection of domestic workers.

Finally, the Court of Appeals' emphasis upon those wage rates established by the Secretary in practical effect disadvantages domestic workers by withdrawing wage determination from the marketplace. Practical experience reveals that the administrative designation of wages undermines competition in regard to wages and results in low wages, thus displacing domestic workers who are required to earn amounts consistent with higher costs of living in this country. (See, *Spradlin*, *supra*, 30 G. Wash. L.

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and Labor, Subcommittee on Agricultural Labor, 94th Cong., 1st Sess. (March 20, 1975) p. 15. Hereinafter referred to as "Hearings".)

Rev. at 107 *et seq.*)[12] This effective withdrawal of wage determination from the marketplace necessarily contravenes

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[12]The adverse impact wage established by the Secretary in 20 C.F.R. § 602.10b (a)(1) bears no relation to a market-established wage. The formula setting the rate has been described as follows:

> "The initial [adverse effect] rates were . . . [f]or the majority of [s]tates . . . based on the national average hourly farm wage rate . . . Between 1963 and 1968 slightly different formula were used . . . From 1968 to the present time, the rates have been adjusted annually by applying the statewide percentage change in the USDA hourly farm wage rate."
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> Hearings, p. 22

This method, which had no relation in its inception to the particular crop or local conditions, provides adjustments independent of the marketplace for workers in a particular crop. Under this method, the somewhat ironic circumstance developed that the Secretary's wage in certain crops was lower than the wage for such crops mandated by other applicable federal legislation. (See, *Florida Sugar Cane League v. Usery*, 531 F.2d 299, 301-302 (5th Cir. 1976).)

Congressional intent.

B. The Decision Of The Court Of Appeals Is In Conflict With The Applicable Regulations And Conflicts With Other Court Of Appeals Decisions.

In its opinion, the Court of Appeals accords the applicable regulations scant concern or analysis, at points misstating the ostensibly controlling regulations.[13] The failure of the Court to analyze the regulatory scheme implementing the H-2 program creates substantial conflict between the clear import of the regulations and the declaratory judgment ordered. Further conflict arises when the Court's decision is analyzed in light of decisions of other Courts of Appeal.

1. The Regulatory Framework.

Under the mandate of § 184(c) of the INA, 8 U.S.C. § 1184(c), the Attorney

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[13] See Petition, p. 8, fn. 16.

General, through the Immigration and Naturalization Service, has delegated to the Secretary the responsibility for certifying the need for temporary nonimmigrant labor. (8 C.F.R. § 214.2(H)(3)(1973).) This delegation specifies that H-2 workers are admissable only if (1) there are no available domestic workers *and* (2) the wages to be paid will not adversely affect the wages and working conditions of domestic workers. (8 C.F.R. § 214.2(H)(3)(i).) This language, invoking the conjunctive, states a two-fold hurdle to admission of H-2 workers, a protection ignored by the Court of Appeals' holding that nonimmigrant labor may be admitted if available domestic workers seek wages *or* benegits higher than the "adverse effect wage."

In large part, the Secretary's regulations adopted pursuant to the delegation in 8 C.F.R. § 214.2(H)(3) restates this bipartite limitation upon admission of H-2 workers. Not only must an employer requesting such workers pay the "adverse impact wage" and determine that no domestic workers are available, but

efforts to obtain domestic workers willing to work at the adverse impact wage must be continued even during the period nonimmigrant labor is admitted.[14]

Thus, regulations establishing the conditions for H-2 certification require determination that there exists an absence of domestic workers to perform the work and that the wages and benefits to be paid the H-2 workers will not adversely affect domestic workers. This

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[14]The Court of Appeals apparently misread 8 C.F.R. § 602.10(d)(2) to require the simple determination that domestic workers were not available at the "adverse impact wage". However, a reading of the regulatory language (*Id.*) consistent with the Attorney General's delegation provides no solace for the Court of Appeal in its reading of the regulation. Clearly, 8 C.F.R. § 602.10(d)(2) requires employers to continue recruitment of domestic labor at the adverse impact wage if the available work is done by H-2 workers and is of the kind for which domestic workers have been determined to be unavailable. This is the only interpretation of the language consistent with 8 C.F.R. § 214.2(H)(3) . . . and § 101(a)(15)(H)(ii) of the INA, 8 U.S.C. § 1101(a)(15)(H)(ii).

conclusion, rejected by the Court of Appeals, finds further support in the obvious intent of the Attorney General to require at a minimum, the standards set forth in § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14). The use of language in 8 C.F.R. § 214.2(H)(3) paralleling the language adopted by the Secretary in implementing § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14), indicates the Attorney General's intent to apply the same standards.[15]

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[15]In pertinent part, 8 C.F.R. § 214.2(H)(3)(i) (1973) provides that admission of H-2 workers requires a certificate of the Secretary that:

> "qualified persons in the United States are not available and that the employment of [the H-2 worker] will not adversely affect the wages and working conditions of workers in the United States similary employed . . ."

At the time this delegation was promulgated, the Secretary's regulations pursuant to § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) provided in pertinent part, that an alien would not

(See *United States v. Cooper Corporation*, 312. U.S. 600, 606 (1941); *United States v. Vargas*, 380 F. Supp. 1162, 1166 (E.D.N.Y. 1974)). Section 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) clearly requires the determination of adverse effect to be disassociated from investigation of the availability of domestic workers.[16]

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be certified unless the Secretary determined

> "that qualified U.S. workers are not available and that [the alien's] employment will not adversely affect wages and working conditions of the workers in the United States similarly employed."
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> 29 C.F.R. § 60.1 (1971); superseded and reworded, 20 C.F.R. § 656.00 (1977).

These regulations then set forth specifics in which aliens would be certified.

[16]Under § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14), the Secretary has generally determined that there are "sufficient United States workers . . . able, willing, qualified and available" (20 C.F.R. § 656.11(a)) to "plant, cultivate and harvest farm products" (20 C.F.R.

In view of the applicable regulatory language, the Court of Appeal's decision cannot stand.

2. The Courts of Appeals' Interpretation Of The "Availability" Requirement.

Given the obvious relationship between H-2 and Section 214(a)(14) certification, decisions of the Courts of Appeal aid in interpreting the standards for determining availability. From this perspective, the decision of the Court of Appeals in this action stands in isolated conflict with other applicable decisions of the Circuits.

The federal courts have consistently analyzed the question of the availability of domestic workers without reference to wages demanded; the investigation pursued simply inquiries

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§ 656.11(b)(33)). The H-2 certification in this case is thus somewhat incongruous, given the Attorney General's intent to parallel H-2 and § 214(a)(14) certification. (See fn. 15, *supra*.)

whether qualified workers are available to do the required job. (See, *Acupuncture Center of Washington v. Dunlap*, 543 F.2d 852 (D.C. Cir. 1976), *cert. den.*, ___ U.S. ___, 97 S.Ct. 62; *See v. Department of Labor*, 523 F.2d 10 (9th Cir. 1975); *Silva v. Secretary of Labor*, 518 F.2d 301, 309-310 (1st Cir. 1975); *Pesikoff v. Secretary of Labor, supra.*) In not one of these cases has the focus been upon the availability of workers at a particular wage, the standard adopted by the Court of Appeals in this action.

The clear differentiation between examination of availability, on the one hand, and adverse impact, on the other, was specifically noted by the Court in *Silva v. Secretary of Labor, supra.* Criticizing the Secretary's "availability" determination, the Court nonetheless noted that even where domestic workers were not available, certification might still justifiably be refused on the basis of "adverse impact". (518 F.2d at 310 (*dictum*).)

The Court of Appeals' decision challenged herein thus conflicts with the clear import of decisions construing § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14). Review in this action must be granted to affirm the necessary separation of the "adverse effect" and "availability" determinations for labor certification. Without such affirmance, substantial protections accorded domestic workers will be effectively diluted.[17]

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[17] *Rogers v. Larson*, 563 F.2d 617 (3rd Cir. 1977) cited by the Court of Appeals in its decision (Petition, p. 5b; 567 F.2d at 1156) is totally inapposite. *Rogers* concerned state statutory enactments regulating the duration of a non-immigrant's period of work. The Court in *Rogers* found this regulation inconsistent with the extensive federal regulation of the H-2 program. The decision in no way analyzed the appropriate inquiry prior to admitting workers pursuant to such program.

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II

THE PETITION SHOULD BE GRANTED TO PREVENT FRUSTRATION OF ESTABLISHED POLICY AND TO PREVENT IRREPARABLE INJURY TO THE AMERICAN FARM WORKER.

The decision of the Court of Appeals in this action substantially weakens the barriers to use of nonimmigrant temporary labor clearly specified by Congress. (See discussion, Section I-A, supra.) Not only does this ignore Congressional concerns, but substantially threatens both established policy and the welfare of workers.

The day has long passed since the contention could be questioned that basic policy protects the right of workers to organize collectively for betterment of their wages and working conditions. Although somewhat belated, organizing of agricultural laborers has passed the gestation stage to yield circumstances where substantial numbers of farmworkers have been organized. Yet, this increasing advancement of farmworker organization stands in danger of an abrupt

termination if the decision of the Court of Appeals stands to regulate the circumstances in which nonimmigrant labor can displace domestic workers.

Substantial displacement of domestic workers would irreparably damage American labor. In circumstances of high unemployment, the Court of Appeals' decision encourages admission of nonimmigrant labor. The failure of domestic workers to receive the jobs awarded H-2 workers not only prevents a decrease in debilitating unemployment, but serves to reduce money flowing into the economy. The ripples of affect spreading from admission of H-2 workers will irreparably injure not only the domestic agricultural workforce, but the nation's economy in general.

Such interference with collective activity and detrimental impact on the economy of this country could not be intended effects of the H-2 program. This Court should grant the Petition to prevent such effects.

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A. The Decision Of The Court Of Appeals Undermines Policies Protecting Collective Bargaining And Constitutional Rights.

Since adoption of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*), collective action by American workers has been recognized as protected. The decision of the Court of Appeals undermines this protection, for the decision particularly notes that collective activitiy demanding higher wages or benefits than those dictated by the Secretary renders participating workers subject to displacement by H-2 workers. (Petition, p. 4b; 567 F.2d at 1155-56.)

The public policy of this county has been stated to protect workers in their collective activity for advancement of wages and working conditions. (§2 of the Norris-LaGuardia Act, 29 U.S. §102, quoted, in part, at Petition, pp. 11-12.) This policy also finds support in state enactments expressive of the same concern for protection of labor's association for the purpose of mutual gain. (E.g., California Labor Code §923.) Such ex-

pressions of policy have been found substantively to protect workers' associational activities (See, e.g., *Wetherton v. Growers Farm Labor Association*, 725 Cal. App.2d 168, 79 Cal.Rptr. 543.)

The generally stated policy protective of collective activity by labor has, for farmworkers, been specifically recognized by enactment of legislation to protect their rights to organize.[18] (Petition, p.14, fn. 26.) Thus, the California Legislature has stated

> "[Agricultural] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."
>
> California Labor Code § 1152.

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[18] Agricultural employees are, of course, excluded from coverage by the National Labor Relations Act, as amended (§2(3) of the NLRA, 29 U.S.C. §152(3)). This cannot be read as a congressional statement that farmworkers are not protected in their efforts to organize. Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 Cal.L.Rev. 1939, 1951, *et seq.* (1966).

There thus can exist little dispute that this country's policy protects the right of agricultural workers to join together for mutual aid and protection. This policy effectly reflects the protection of labor organizing stated in the Constitution. (*Hanover Township Fed. of Teachers Local 1954 v. Hanover Com. School Corp.*, 457 F.2d 456 (7th Cir., 1972); *McLaughlin v. Tilendis*, 398 F.2d 287, 288 (7th Cir., 1968). See, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); *Thomas v. Collins*, 323 U.S. 516 (1975).)

This policy protecting collective organization by agricultural employees has recently been translated, in various states, into administrative mechanisms for recognition of labor organizations and protection of workers' rights to organize. Since the passage of the California Agricultural Labor Relations Act, California Labor Code §1140 *et seq.*, in June, 1975, over 500 elections have been held for certification and literally thousands of Unfair Labor Practice

proceedings have been initiated.[19] In this climate facilitating organizational activities by farmworkers, the number of agricultural workers represented by collective bargaining agreements has increased markedly. A correlative rise in the protections and benefits received by California agricultural workers has, expectedly, resulted. Whereas the first collective bargaining agreements signed involving California agricultural employees set a minimum wage rate of $1.25 per hour, the most recently executed contracts establish a wage rate of $3.80 per hour. In addition, benefits (including pension plans, medical benefits, and payment for jury service) hitherto unavailable to agricultural workers have been extended to thousands of persons. One offshoot of the increased wage and benefit package available to farmworkers has been a resulting decrease in the number of workers forced to migrate

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[19] These statistics are compiled from records maintained by *amicus curiae* United Farm Workers.

from one area to another in search of work.[20]

These gains, and the policy protecting organization among agricultural labor, stands in danger of being dissembled. If allowed to stand as the dispositive interpretation of circumstances in which H-2 workers are admissable, the Court of Appeals' decision would substantially undermine both federal and state policy favoring collective bargaining as the means for resolving employer-employee relations in the agricultural sphere and weaken, if not destroy, the incipient organizational effects involving agricultural employees. The Court of Appeals

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[20]The *Salinas Californian* of April 15, 1978, p. 1, reported that a recent university survey among employers in agriculture in Monterey County, California, indicated that the agricultural workforce was becoming substantially less migratory. As one worker working under a collective bargaining agreement noted:

> "I make enough working in the lettuce - eight months of steady work - to get by for me and my family. And this way, we have a home."

clearly states that if workers, through exercise of their rights, join together to advance their wages and working conditions, an agricultural employer can, on that basis, deem such workers unavailable and seek certification of H-2 workers. The consequence, admission of H-2 workers in circumstances where workers are organizing, would inevitably be the defeat of the organizational efforts.

A scenario can easily be imagined to illustrate the injury to collective activity by agricultural workers if the decision of the Court of Appeals remains unexamined. The circumstance could arise in which agricultural workers join together to seek a health insurance program covering them and their families.[21] The workers might engage in collective action, such as a strike, for purposes of obtaining this benefit. Since health

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[21]The Secretary's regulations provide that insurance need only provide for injury resulting from job-related accidents. (20 C.F.R. §602.10a(c).)

insurance is not one of the benefits believed necessary and thus dictated by the Secretary, under the Court of Appeals' decision, the workers on strike would be "unavailable" for determination of whether H-2 workers are admissable. Their employer could then seek certification of workers pursuant to 20 C.F.R. §§602.10-10b. Nonimmigrant workers would then be admissable under §101(a)(15)(H)(ii) of the INA, 8 U.S.C. §1101(a)(15)(H)(ii). In effect, H-2 workers would be imported for purposes of breaking a strike by domestic workers.

Similarly, the decision of the Court of Appeals frustrates any efforts by domestic workers to improve their earnings. Any collective action by domestic workers to secure higher pay than that mandated by the Secretary would *ipso facto* determine their status under applicable regulations as one of unavailability for the work. In view of the unavailability of workers, certification would be sought and H-2 workers imported to undermine the efforts of the

workers to secure a higher wage.[22]

There can be little dispute that agricultural workers, faced with some of the most difficult working conditions, are nonetheless among the least paid and most severely disadvantaged; they occupy a second class status in terms of the availability of organized representation and their ability to improve their present conditions. In spite of this status, organizational efforts among farm workers have recently begun to bear fruit, with improved wages and working conditions being the result of success in these efforts. The decision of the Court of Appeal, if allowed to stand, would write a quick, and probably irreversable, finish to the organization of domestic

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[22]In effect, such circumstances have occurred. Texas growers, unable to find workers willing to work at a liveable wage, convinced Respondent Castillo that H-2 workers from Mexico should be admitted at less than the wage set by the Secretary as the minimum wage to be paid. This incident was reported in *The New York Times*, June 21, 1977, p. 1, and the *Salinas Californian*, June 21, 1977, p. 1.

farmworkers.[23] The protections accorded agricultural workers in their organizing would have undermined and, in effect, the Secretary would dictate wage and benefits in agriculture, enforcing the worker's acquiescance through the threat, if not the reality, of imported foreign labor.

The policy of this County is to protect domestic workers, leaving wages and benefits to be paid to the action of the marketplace. (*Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976).) The Court of Appeals' decision would undermine this policy, and frustrate the policy favoring collective

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[23] It is historically uncontestable that foreign labor has been utilized as a means to keep wages low among farmworkers and insure that this segment of the workforce remains beyond the reach of organizational efforts. (See, e.g., Jacques E. Levy, *Cesar Chavez: Autobiography of La Causa*, p. 132 *et seq.* (W. W. Norton & Company, Inc., New York, 1975); *Spradlin, supra*, p. 108.

activity by workers, by designating the Secretary's required wages for H-2 workers as the amounts American workers must accept and forcing conformity with these wage rates by allowing importation of H-2 workers when domestic workers balk at the Secretary's dictates. Such circumstances cannot, in logic or policy, be allowed to stand, and the decision of the Court of Appeals must be reviewed.

B. If The Decision Of The Court Of Appeals Is Allowed To Stand, Substantial Injury Will Be Done To The American Workforce.

As discussed above (*supra* at pp. 18), § 101(a)(1)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii), provides that nonimmigrant workers should be admitted to perform temporary labor only if there are not persons unemployed in the country. Despite this clear statement limiting the admissability of foreign workers, the Secretary has recently announced, in spite of the substantial unemployment in this country, that plans are in effect to increase the number of

H-2 workers from approximately 20,000 to 100,000.[24] Such an action, which is ostensibly permitted pursuant to the decision of the Court of Appeals, would substantially affect the domestic workforce. A number of consequences from an increase in nonimmigrant workers can be noted.

For one, the admission of 100,000 foreign workers will mean that 100,000 jobs will not be open to domestic workers.[25]

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[24]Secretary Marshall was quoted in an article printed in the *Fresno Bee*, August 31, 1977, p. 1, as saying that the administration was planning to increase the number of foreign laborers admitted under the H-2 program and that he didn't expect the number of admissions to exceed 100,000.

[25]Any argument that domestic workers are not willing to perform agricultural jobs is patently specious. They may be unwilling to work at the Secretary's speculative "prevailing" wage (see fn. 12, *supra*), but there is no evidence that a decent, liveable wage would not yield domestic workers willing and available to work in the fields. The experience upon the termination of the

Second, the undermining of organized labor in agriculture (see discussion, section II-A, *supra*) will result in severe displacement of domestic workers. Former migrant workers able to establish homes because of unionization (see fn. 20, *supra*) would be forced back into the difficult migratory pattern. Not only does this affect the worker, but community stability will be affected.

Thirdly, the importation of foreign workers will mean that wages earned in this country will be expended in foreign countries rather than used in the domestic economy.[26] The present im-

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Bracero program showed that grower claims that domestic workers will not engage in farmwork are unsupportable. Morris, *supra*, fn. 18, pp. 1941-42. And, the Secretary has determined that there are sufficient number of farmworkers. (See fn. 16, *supra*.)

[26]Contracts negotiated with the West Indies, for example, provide for a certain sum of money to be placed into reserve to be sent to the worker's home country. (Hearings, p. 22 *et seq.*)

balance between exports and imports condemns this consequence of the increased admission of H-2 workers.

These illustrations of affects resulting from implementation of the proposed increase in H-2 workers sanctioned by the Court of Appeals' decision reveal consequences anathema to and violative of the Congressional intent in establishment of the H-2 program. Clearly, the strict limitation placed upon the circumstances in which nonimmigrant labor could be admitted under § 101(a)(15)(H)(ii) of the INA, 8 U.S.C. § 1101(a)(15)(H)(ii) was designed to insure that domestic workers would not be adversely affected by such admission. If the decision of the Court of Appeals is not reviewed by this Court, the prohibited adverse effect on the domestic workforce will surely result. The Petition in this case should be granted to prevent this unacceptable result.

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CONCLUSION.

The United Farm Workers, formed to improve the deplored and desperate circumstances in which farmworkers were forced to labor, has, through the organization of segments of the agricultural workforce, improved the conditions in which our Nation's agricultural commodities are grown and harvested. These advances stand, however, on the verge of being reversed, with a consequent imposition of the previously universally condemned conditions. The threat to the advances by farmworkers has been created by the Court of Appeals' decision in this action, which sanctions the admission of nonimmigrant temporary labor to undermine the domestic workforce.

This decision cannot be justified, either by reference to the applicable statutes and implementing regulations or the basic policies of this Country. As noted herein, the Court of Appeals has misread the applicable authority and given short concern to the adverse

impact of its decision on the Nation's policies.

The Petition on file in this action should be granted to reaffirm the clear Congressional intent with regard to importation of non-domestic workers and to prevent the unacceptable results which will necessarily follow if the decision in this action is allowed to stand. Failure to accept the petition can only result in unacceptable consequences, both to farmworkers and the Nation.

April 19, 1978.

Respectfully submitted,

JEROME COHEN

GEORGE C. LAZAR

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Service of the within and receipt of a copy thereof is hereby admitted this _____ day of April, A.D. 1978.

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